No. 12418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, ETC.,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the appellant, California State Board of Equalization, and submits the following reply brief:

I.

Appellee's Reply Brief Misstates Appellant's Position.

Appellee's brief sets forth at page 2 that appellant has "conceded that the penalties are allowable, if at all, as expenses of administration" and cites as authority for that statement Appellant's Opening Brief, page 7. Reference to Appellant's Opening Brief at the page indicated, however, demonstrates that appellant has not made the concession indicated and that the second specification of error, although it is an alternate one, specifically alleges that the penalty items should have been allowed as contingent claims pursuant to Section 307 of Chapter XI of

the Bankruptcy Act. Inasmuch as Section 307 refers to debts, demands or claims of whatever character "against the debtor," it is obvious that the statement at page 2 of Appellee's Reply Brief is erroneous.

Furthermore, appellee erroneously states at page 4 of his brief "that appellant is not consenting to its tax claim being extended, but on the contrary, is insisting upon payment in full including penalties. . . ." This statement is, of course, contrary to the second specification of error set forth in Appellant's Opening Brief at page 7, it being expressly stated at that point that appellant claims the penalty items "as debts to be extended."

At page 8 of Appellee's Reply Brief it is asserted that appellant is "contending for its right of priority, not only as to the tax, but as to penalties and interest as well." This, of course, is not so. To the contrary, the penalties are claimed by appellant "as an expense of administration or, in the alternative, as a debt to be extended under the extension provision of Exeter's plan of arrangement." (App. Op. Br. p. 18.)

II.

Appellee's Contention That Rights of Creditors Are Fixed as of the Date of the Filing of the Petition in Bankruptcy Is Pertinent Only to Appellant's Second, Alternative Specification of Error.

Appellant's second specification of error is, of course, predicated on the theory that appellant's rights, as the holder of a contingent claim, were fixed when Exeter filed its petition under Chapter XI of the Bankruptcy Act. (Appellee's Rep. Br. p. 2.)

III.

Appellant Does Not Contend That Penalties Owing by a Bankrupt Are Allowable in Straight Bankruptcy Proceedings but Does Contend That Penalties Owing by a Debtor Are Allowable in Chapter XI Proceedings Involving an Arrangement Providing for an Extension in Whole or in Part.

Appellant's Opening Brief, we believe, makes it unnecessary to restate appellant's position regarding the inapplicability of Section 57j to Chapter XI proceedings involving an arrangement providing for an extension. (App. Op. Br. p. 17.) However, inasmuch as Appellee's Reply Brief seems to imply, at page 3 thereof, that Section 302 of Chapter XI of the Bankruptcy Act (relied upon by appellant to support its contention that Section 57j is not applicable) is authority for *appellee's* contention that penalties are *not* allowable pursuant to Section 307 as claimed by appellant, the court's attention is directed to the fact that Section 302 specifically provides that the provisions of Chapters I to VII of the Bankruptcy Act (including Sec. 57j) do not apply to Chapter XI proceedings where those provisions are inconsistent with the provisions of Chapter XI.

No reply is made to the portion of Appellee's Reply Brief commencing at page 4 and continuing through page 7, inasmuch as that portion of Appellee's Brief is predicated upon the erroneous premise that appellant is claiming the penalties as prior tax claims and not as unsecured debts to be extended.

IV.

Reply to the Portion of Appellee's Brief Entitled "Plan of Arrangement."

Appellee contends that appellant's failure "to elect, *in writing,* to an extension of the payment" of the penalties in question makes the claim for those penalties "fall under the composition part of the plan" and that we are, accordingly, not concerned with debts to be extended, within the purview of Section 307. This contention, however, ignores the fact that if the penalties were not claimed as debts to be extended, Section 57j would preclude their allowance to any extent as debts of the debtor under the composition part of the plan. If the penalties are allowable at all in this proceeding under Chapter XI as debts of the debtor it must be on the theory that the penalties are unsecured debts and in fact claimed as debts to be extended. As we have set forth above, although the appellee appears to be confused in this regard, the penalties are claimed by appellant (in the alternative) as unsecured debts to be extended.

Appellee attempts to make capital of the fact that appellant did not specifically elect in writing, prior to the confirmation of the instant plan of arrangement, to come in under the extension provisions of the plan. It is obvious, however, that such a specific election would have been merely an idle act for, as set forth in the preceding paragraph, appellant in fact had no election. Appellant either came in as an unsecured debtor on a debt to be extended or it did not come in at all; and having filed a proof of claim, appellant must necessarily be deemed to have consented to extended payment. It is elementary that the law does not require idle acts.

Appellee attempts to confuse the issue by asserting that appellant is a creditor with a right to priority as a tax claimant under Section 64, and entitled to be paid as such under subdivision 2 of Section 337 upon the approval of the plan but not before. We are unable to perceive how appellant can be entitled to priority under Section 64 and at the same time present a contingent claim under Section 307, which applies exclusively to debts to be extended.

As we have stated above, appellant (on one alternative ground) is not contending for priority of payment pursuant to Section 64 but for payment pursuant to Section 307. The case of *New York v. Saper,* 336 U. S. 328, 69 Sup. Ct. 554, cited by appellee, relates to post-bankruptcy interest in a straight bankruptcy proceeding and is not relevant here. (See Appellee's Rep. Br. pp. 8, 9, 11-13.)

V.

The Penalties Should Be Allowed as an Expense of Administration.

Appellee contends at length (Appellee's Rep. Br. pp. 9-11, 13-16) that a receiver is not liable for statutory penalties accruing for failure to file returns and pay taxes admittedly due, for taxable periods preceding the receiver's appointment. Attention, however, is respectfully directed to the fact that the United States Court of Appeals for the Seventh Circuit has held a Section 77 railroad-debtor trustee liable for penalties under analogous circumstances.

See,

In re Chicago & N. W. Ry. Co.;
Thomson v. Toman, 119 F. 2d 971.

The facts involved in the last cited case can be succinctly summarized. Prior to the commencement of proceedings under former Section 77 of the Bankruptcy Act, 11 U. S. C. A., Section 205, certain real property taxes had become a lien upon the railroad-debtor's property. Payment of the taxes, however, was not required until a date subsequent to the commencement of the proceedings under Section 77, and, accordingly, the penalties for failure to make timely payment did not accrue and become payable until subsequent to the commencement of the Section 77 proceedings and the appointment of the trustee. The court cited *Boteler v. Ingels,* 308 U. S. 57, 60 Sup. Ct. 29, 31, 84 Law Ed. 78 (App. Op. Br. p. 14), quoted the portion of the decision in that case which discusses Section 57j and the Act of June 18, 1934, and concluded that the trustee was liable for the penalties because "the trustee could have prevented the accrual of such penalty."

As was true in the Seventh Circuit case, and as is true here in the case of appellee-receiver,

> "It was the nonpayment of the tax *by the trustee* which caused the penalty accrual. If this were a case of first impression, we might hesitate to construe the 1934 Act of Congress so broadly as to make a trustee liable for penalties in the instant case, but the statute, as construed in the Boteler case, leaves us without doubt."
>
> *In re Chicago & N. W. Ry. Co., supra,* 119 F. 2d 971, 972.

Conclusion.

It is respectfully submitted that the foregoing decision of the United States Court of Appeals for the Seventh Circuit should be followed herein and the penalties in question allowed as expenses of administration. In the alternative, it is submitted that the penalties in question should be allowed as contingent claims pursuant to Section 307 of Chapter XI as debts to be extended.

Respectfully submitted,

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